



**P R O C E E D I N G S**

THE COURT: Good morning. Please be seated. This is United States versus Varner. Ms. Schommer, government ready to proceed?

MS. SCHOMMER: Yes, Your Honor.

THE COURT: And Mr. Aligada?

MR. ALIGADA: Yes, Your Honor. Thank you.

THE COURT: Okay. Mr. Varner, you're ready to proceed as well?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Come on up with your lawyer. Are there any changes or disagreements or anything that we need to discuss in the presentence investigation report?

MR. ALIGADA: There's one remaining objection, but because the parties don't object to the fact of armed career criminal designation, it's irrelevant. It doesn't need to be resolved, and I've talked to the government, and we both jointly agree on that position.

THE COURT: I don't know what you are -- are you talking about the four points for the drugs?

MR. ALIGADA: That's correct, Your Honor.

THE COURT: Okay. So for what it's worth, I am not going to give him those four points, but it doesn't actually make any difference because the total offense level is as everybody seems to agree, a 33.

1           So that means that the imprisonment range under the  
2 guidelines is 235 to 293 months. And the criminal history  
3 category, of course, is a 6. The supervised release range is  
4 three years to five years. The fine range is \$17,500 to  
5 \$175,000. And then there of course has to be a \$100 special  
6 assessment.

7           Now, there were a couple motions that were made in  
8 advance of sentencing, one by the government and one by the  
9 defense. Let me first hear from Ms. Schommer, the government  
10 is withdrawing its motion for an upward departure from the 293  
11 months; is that true?

12           MS. SCHOMMER: That's correct, Your Honor.

13           THE COURT: Okay. And, Mr. Aligada, there was  
14 originally a motion for a new trial based on alleged juror  
15 misconduct. That motion is withdrawn as well?

16           MR. ALIGADA: That's correct, Your Honor.

17           THE COURT: All right. Ms. Schommer, anything from  
18 the government before I impose sentence?

19           MS. SCHOMMER: Yes, Your Honor, if I may stay here.

20           THE COURT: That's good.

21           MS. SCHOMMER: While the United States has withdrawn  
22 its motion --

23           THE COURT: Hold on a second. Mr. Varner, if you  
24 want to listen to what the government has to say, I think  
25 that's probably a good thing.

1 THE DEFENDANT: I just need to sit down for a few  
2 minutes.

3 THE COURT: Okay. Well, since the government is  
4 talking anyway, why don't you go back and sit. Are you going  
5 to be very brief or not?

6 MS. SCHOMMER: Very brief, Your Honor. I mean if  
7 the defendant wants to sit --

8 THE COURT: Okay.

9 MS. SCHOMMER: -- close to the podium. I am going  
10 to be brief, Your Honor. Although, the United States is  
11 withdrawing its motion for an upward departure, the criminal  
12 history nevertheless supports a guideline sentence which is  
13 from 235 to --

14 THE COURT: Hold on just a second. We'll get the  
15 defendant situated here. Well, he can go over there. There's  
16 already a low microphone for him, if he's going to talk,  
17 Mr. Aligada. It's right there in front of you.

18 MR. ALIGADA: Thank you, Your Honor.

19 THE COURT: But aren't you going to talk first?

20 MR. ALIGADA: I will, but I can talk with these  
21 microphones.

22 THE DEFENDANT: Can you hear me okay?

23 THE COURT: Ms. Schommer, go ahead.

24 MS. SCHOMMER: Thank you, Your Honor. The  
25 defendant's criminal history is extensive. It's known to the

1 Court. It started when the defendant was approximately 20  
2 years of age and has continued until today.

3 The defendant complains in his sentencing position  
4 paper that he has serious physical infirmities including a  
5 back injury, but he also states that that back injury occurred  
6 well before the conduct that brought us here today. It  
7 certainly didn't stop him from committing crime. It certainly  
8 didn't stop him from running from the police, darting in  
9 between houses, and jumping over fences trying to get away from  
10 them while he possessed a gun. And I would suggest that his  
11 physical impairment now is not a reason to vary downward from  
12 the guideline range.

13 The defendant is in the position that he's in  
14 because of his own criminal conduct. That criminal conduct  
15 got him 34 criminal history points. Almost three times the  
16 level that he needed just to get at the criminal history  
17 category 6.

18 Clearly, the sentences that he's received before  
19 have not deterred him from additional criminal conduct. It's  
20 not taught him any respect for the law. Certainly, hasn't  
21 protected the public from the defendant's continuing criminal  
22 action, and it hasn't provided just punishment.

23 So the United States would suggest that a sentence  
24 within the guideline range between 235 and 293 months is  
25 appropriate in this case and would ask for such a sentence.

1           THE COURT: Thank you. Mr. Aligada, again, your  
2 client seems to want to talk to you. Do you want to take a  
3 minute and consult with him before I hear from you?

4           MR. ALIGADA: Yes, Your Honor. Thank you.

5           (Off the record discussion between defendant and  
6 defense counsel.)

7           (In open court.)

8           MR. ALIGADA: Thank you, Your Honor. May I proceed?  
9 Last week, Your Honor, I sent to the Court a letter from  
10 Raymond Varner, Mr. Varner's cousin. In addition, I sent some  
11 photographs. Included was this photograph, which was a color  
12 copy, but I hope that the Court can see that in Mr. Varner's  
13 hand in the photo is a scissors.

14          THE COURT: I saw that.

15          MR. ALIGADA: And what I didn't understand until  
16 this morning is that the gentleman who is second to the left  
17 is wearing a barber cape. And the occasion that was being  
18 celebrated at the time that this photograph was taken was  
19 Mr. Varner beginning a turn around of his life. He had chosen  
20 a profession that he believed deeply in, and that profession  
21 was cutting hair. He went to barber school. He graduated.

22          And the Court will note that the men in this picture  
23 all have incredibly short hair, including the gentleman  
24 wearing the cape, and that's because Mr. Varner had just cut  
25 each of their hair.

1 THE COURT: Well, now what about the fellow with the  
2 purple hat? He's got some really long hair sticking out the  
3 back.

4 THE DEFENDANT: That's a girl.

5 MR. ALIGADA: That's Mr. Varner's daughter, Your  
6 Honor, who is a player on the Lynx team. He did tell me this  
7 morning that he had done some work on her dreadlocks, however.  
8 So she was included in the ability for Mr. Varner to show his  
9 talents.

10 This was an important day for Mr. Varner because  
11 there is no dispute that he has significant criminal history,  
12 but this was a point in his life where things had begun to  
13 turn around. I recognize that we're here for a different  
14 reason. But the summer of 2010 was a special time because  
15 Mr. Varner, as I said, had chosen a profession, was doing what  
16 he could to make a difference in people's lives, and that was  
17 cutting hair.

18 The presentence report has a very nice paragraph  
19 that the writer produced explaining what this new profession  
20 meant to Mr. Varner. And, frankly, the potential that he had  
21 to make a difference in people's lives.

22 I bring this fact to the Court's attention because  
23 as the Court knows Mr. Varner's history and background, but  
24 also his potential for the future are important. He stands  
25 convicted of a crime for which he has to be punished. There's

1 no question about that.

2 But the recidivist enhancement that comes with armed  
3 career criminal provides a significant floor for the Court of  
4 180 months and a significant guideline range. It's my  
5 position that the starting point for -- before any departure  
6 or variance is appropriately in the 235 to 293 range. And the  
7 basis for that is the balance between the significant criminal  
8 history with the potential that I've just talked about, and  
9 really the idea that Mr. Varner had internalized in his mind  
10 that a change should happen.

11 Now, from that starting point, I've made a motion  
12 for a downward departure on the basis of Mr. Varner's health  
13 condition. This is not a variety of health condition that is  
14 without documentary backup and medical justification. The  
15 presentence report has a lengthy paragraph that discusses the  
16 medical condition that Mr. Varner has.

17 But more importantly for purposes of the legal  
18 departure, it describes the effect on his life in a custodial  
19 setting. The Eighth Circuit law on 581.4, which I've detailed  
20 in the memorandum, explains these three conditions that have  
21 to be met before a departure is appropriate. And it's my  
22 position that all three of those conditions have been met.

23 In addition to the information that I've included in  
24 the sentencing memorandum itself, it's clear by what's  
25 happened in court today, that Mr. Varner has significant



1 physical impairment, the ability for him to sit and stand.  
2 And I will tell the Court from my experience that this has  
3 been fairly consistent since I met him and had begun working  
4 with him. It has an impact on him in terms of what happens to  
5 him on a daily basis.

6 Lately, Mr. Varner has spent a significant amount of  
7 time in bed in the morning because of the pain. And when we  
8 look at the question under 5H1.4 of whether imprisonment would  
9 provide more than the normal hardship for him, there's no  
10 question that that is true because of this consistent pain  
11 that he experiences.

12 There is a second element that discusses both  
13 inconvenience and danger. Inconvenience is a light term to  
14 use for what Mr. Varner's daily tasks are like with a cane and  
15 a back brace being worn at all times.

16 This Court knows well that federal prisons are a  
17 place where other dangerous offenders are housed. And I  
18 credit the Bureau of Prisons in terms of placing people with  
19 similar physical impairments and abilities together. But I  
20 believe there will still be significant danger for him because  
21 of the lack of mobility.

22 So the final element then is whether there's a  
23 substantial present effect on his ability to function. The  
24 PSR bears that out. As I said, there's a strong paragraph  
25 there that explains it. And you can observe what's happening

1 to Mr. Varner today in terms of his ability to stand for long  
2 periods of time.

3 And it's for that reason, Your Honor, that truly  
4 from a justice point of view of what the right sentence is to  
5 punish him, even if this Court grants the criminal history as  
6 a factor to put him within the guidelines, 15 years of  
7 remaining in this kind of physical condition when it does not  
8 appear that surgery is going to happen. It does not appear  
9 that the strong kind of prescription medication that really  
10 blunts the pain is going to happen for fear of addiction. It  
11 means that he'll spend his sentence in pain and significant  
12 pain.

13 And so in looking at a term, 15 years is incredibly  
14 punitive. And I think that that factor in balancing  
15 everything else matters most in this case. And I ask for a  
16 sentence of 15 years, and I don't do it lightly because of  
17 this medical impairment.

18 As far as a designation, Your Honor, understanding  
19 what the Bureau of Prisons has to offer, a suitable facility  
20 for his medical treatment, I think, is the most important  
21 designation request. But after that, as close to Minnesota as  
22 possible. That leads me to ask for Rochester. I have no idea  
23 whether the bureau will put him there, but I think that it is  
24 an appropriate request. That is all that I have, Your Honor.  
25 Thank you.

1 THE COURT: Thank you. Just looking here to refresh  
2 my memory on the date of the back injury where he was robbed  
3 and thrown against --

4 MR. ALIGADA: February of 2010, Your Honor, is when  
5 that event occurred. And there was medical treatment after  
6 that, but the records that we have show medical treatment in  
7 August of 2010, prior to his arrest.

8 THE COURT: Okay. And then the arrest in this case  
9 was?

10 MR. ALIGADA: September of 2010.

11 THE COURT: Okay. And, Mr. Aligada, did you want to  
12 address the fact that although he appears not to be able to  
13 stand today at the trial, we heard testimony that he ran and  
14 jumped and sprinted.

15 MR. ALIGADA: Yes, and there was also testimony that  
16 he fell at least twice, maybe three times. I think that was a  
17 point of dispute, at the end of the chase. So certainly from,  
18 and I included this in the sentencing position, in terms of  
19 the physical issues, if the Court will remember there was also  
20 some testimony about whether he lost his shoes or not.

21 And so it suggests to me that in the present moment  
22 at that time, physical impairment was part of what happened in  
23 the chase that ultimately lead in him being arrested and  
24 apprehended. He did -- I mean an important part of the  
25 testimony was falling in the alley on his tailbone and coming

1 over a fence, and then falling again. And so it's my position  
2 that physical impairment was part of it then.

3 I don't remember much testimony about how fast he  
4 was running.

5 THE COURT: Well, the police officer testified that  
6 he was pretty much running, it seemed flat out, and your  
7 client jumped over a fence. I mean he jumped over a fence and  
8 then fell on his tailbone is my recollection of the testimony.  
9 So has anything happened? Has he had another injury between  
10 then and now? He can't sit, and he did not seem to be in this  
11 much distress during the trial.

12 MR. ALIGADA: I will tell the Court that -- I'm  
13 trying to be careful about privilege here -- but I will tell  
14 the Court that his back issues made it difficult for him to  
15 sit at trial for the extended periods of time that he did.  
16 And as you can see today, he's preferring to sit.

17 The question, of course, for this Court is in a  
18 penal institution, will he be able to sit or lie down all day?  
19 I think the answer to that in general is no, unless they make  
20 special accommodations for him.

21 But the presentence report includes information that  
22 even sitting can be painful for him and create a numbing  
23 sensation and throbbing in his legs.

24 THE COURT: Now, he's been in custody for going on a  
25 year now?

1 MR. ALIGADA: That's correct.

2 THE COURT: And have there been any -- I don't have  
3 any medical reports from the jail where he's been indicating  
4 that they haven't been able to accommodate his medical  
5 situation. They've got him on a brace and some non-narcotic  
6 pain medications. You were just going to direct me to a  
7 particular paragraph?

8 MR. ALIGADA: That's right. I'm sorry, Your Honor,  
9 to interrupt. Page 20 of the PSR at paragraph 70 discusses  
10 physical condition. And I think it's important to note that  
11 in paragraph 70, there is a recommendation from a provider at  
12 Midwest Spine Institute that surgery is recommended. Let me  
13 make sure that I'm correct about this.

14 THE COURT: Well, I can't really understand it. It  
15 says, "noted anterior posterior spinal fusion with  
16 instrumentation and decompression at L4-5." I don't think  
17 that's a recommendation. I think that's a diagnosis.

18 MR. ALIGADA: That's correct. And then there's a  
19 Percocet prescription in paragraph 70. And then the next  
20 paragraph explains that at the jail, there was simply an  
21 authorization for a multivitamin and no medication. And I can  
22 proffer to the Court that this medical issue has been  
23 consistent. I'm holding --

24 THE COURT: It says here in paragraph 72 that he  
25 chose elective surgery consisting laminectomy and fusion

1 surgery with interbody fusion.

2 MR. ALIGADA: This is prior to his arrest. So in  
3 August of 2010 prior to his arrest, he had been seen at  
4 Regions Hospital, and an elective surgery was chosen by him.  
5 The provider provided him the option, and he chose elective  
6 surgery but that surgery did not happen prior to his arrest.  
7 So that's kind of the moment in time of where he was  
8 physically before the arrest happened.

9 To be honest with you, Your Honor, I don't know  
10 whether the chase and falling on his tailbone exacerbated that  
11 injury, but in my mind and the records back up that there were  
12 serious back issues prior to that.

13 This, what I'm holding now, Your Honor, is his  
14 medical file from Anoka. And this is, I don't know, about 100  
15 pages. And I do have the medical referral from Midwest Spine  
16 Institute, which is my understanding did recommend the  
17 surgery.

18 THE COURT: Do you have that?

19 MR. ALIGADA: I do.

20 THE COURT: If you wouldn't mind just giving me that  
21 stack of medical information and I'll take a look at it.

22 MR. ALIGADA: I will do that, Your Honor. The  
23 records to which I've just directed the Court are the records  
24 referenced in PSR paragraph 70, in terms of the treatment that  
25 he received from Midwest Spine Institute.

1 THE COURT: I can't find a date on that. That's  
2 from -- let's see, I can see all of these dates when it was  
3 printed and received but.

4 MR. ALIGADA: Right. Again, I believe that  
5 corresponds with February 3, 2010. 2011, I'm sorry, in  
6 paragraph 70.

7 THE COURT: You think this surgery scheduling  
8 form -- Mr. Varner, I'm going to give you some time to talk to  
9 your lawyer now because I want to make sure that you --

10 You keep talking while everybody else is talking and  
11 I want to make sure that you have an opportunity to listen to  
12 what is being said too, so go ahead and talk to your lawyer  
13 now, if you want to.

14 (Off the record discussion between defense counsel  
15 and defendant.)

16 (In open court.)

17 MR. ALIGADA: Thank you for that time, Your Honor.

18 THE COURT: So he saw Dr. Alper, it looks like  
19 pretty frequently when he was in Anoka County.

20 MR. ALIGADA: I believe -- let me talk to  
21 Mr. Varner.

22 (Off the record discussion between defendant and  
23 defense counsel.)

24 (In open court.)

25 MR. ALIGADA: It's my understanding that Dr. Alper

1 is the doctor at Anoka County, and he's retired now. One of  
2 the issues that arose, in terms of medical care, was that this  
3 condition is specialized enough that specialty care was  
4 important enough for him to receive outside of the facility.

5 So I believe that some of the records that the Court  
6 is seeing is the local doctor working with Anoka County  
7 commenting back and forth on future treatment options, based  
8 on what specialists said.

9 THE COURT: Well, all right. There's a lot here.  
10 Well, here just last month, June, it looks like there was an  
11 observation. There's a record of your client expressing some  
12 sort of concern. It almost doesn't look complete about his  
13 medical situation and the institution saying that they  
14 observed him doing exercises. And he's saying he did push  
15 ups, which is his upper body, and then asking for a response.

16 And the response in the record says, "you've been  
17 observed riding exercise bike and doing pushups with your legs  
18 up on the sink elevated. If are you in so much pain, you  
19 should probably stop doing these exercises." Dated June 6,  
20 2011, at 8 a.m. by some nurse.

21 MR. ALIGADA: One of the issues that has continually  
22 arisen is the question of what Mr. Varner should be doing to  
23 maintain back strength, given the fact that he has throbbing  
24 in the legs, and the ability to use his upper body when his  
25 legs aren't working.



1           Mr. Varner has chosen to do some exercises. We've  
2           gone around in circles about whether correctional folks  
3           observing him in that environment have the ability to comment  
4           on what his true medical condition is from the standpoint of  
5           ongoing pain.

6           The issue that I'm focusing on here is what will his  
7           experience in a custodial setting be like for the next so many  
8           years? And I think that the medical records bear out that  
9           he's in significant pain, has been for some time. And that in  
10          a correctional setting, the options for him are limited, as  
11          far as surgery goes. So that even if surgery were able to  
12          mend him, it's not an option that it appears is going to be  
13          there for him.

14          My experience is that in terms of narcotic treatment  
15          of pain, that's not something that correctional institutions  
16          do for a legitimate medical reason that their fear of  
17          addiction and what happens to medications inside a facility.  
18          Realistically means that Mr. Varner, I think, is limited to  
19          over the counter prescriptions for pain management.

20          The issue that I'm trying to just make known here is  
21          that his future is going to be one of low function in terms of  
22          physical ability, one of constant pain, and that makes it more  
23          punitive for him.

24          The doctors that specialize in his care and the  
25          doctors at Anoka County, I can tell you from months and months

1 of dealing with this, have gone back and forth about what the  
2 right treatment is. The marshals have gotten involved and  
3 have been very responsive to me in terms of trying to figure  
4 out what should happen.

5 But it's clear in the end that no will happen, and  
6 that no pain management more significant than over the counter  
7 drugs will be his future. I can't comment on the Bureau of  
8 Prisons, but I can't imagine that it's going to be much  
9 different.

10 And so my concern today in making this downward  
11 departure motion is I don't want to beat a dead horse here.  
12 But is the nature of what he will experience from a punitive  
13 point of view and how he will be -- how he will feel from the  
14 punishment point of view in custody. That is the issue.

15 THE COURT: Okay. There's no -- looking through  
16 your -- I'm not going to find a doctor's recommendation that  
17 he do those pushups with his legs elevated on a sink, am I?

18 MR. ALIGADA: I believe there was a recommendation  
19 of physical therapy, but I was able to talk with Glen Legus  
20 from the marshal, that he get an exercise book to assist him  
21 in that way.

22 THE COURT: I did see a reference here from the same  
23 person. It looked like the same person saying, "get this back  
24 book."

25 MR. ALIGADA: Right.

1 THE COURT: It's a back --

2 MR. ALIGADA: Essentially, the position that Mr.  
3 Varner has been in is if I can't have surgery, and I can't  
4 have pain management medication stronger than over the  
5 counter, then I have to have some other option here to make my  
6 experience less painful and to be able to strengthen myself.  
7 And so that's the nature of the exercises.

8 What my concern is is that --

9 THE COURT: We probably -- and then just one last --  
10 I interrupted you because I thought you were going to say the  
11 same thing you've been saying which is about his experience in  
12 prison, but if it was something different.

13 MR. ALIGADA: It's just this slight shade of  
14 difference. The medical records show a chronic back problem.

15 THE COURT: No doubt.

16 MR. ALIGADA: The back and forth inside of a  
17 correctional institution from people who are concerned about  
18 institutional safety but aren't licensed medical providers, at  
19 least some of the observational stuff causes me concern, as  
20 far as diagnosing future treatment and future options and what  
21 he's cable of doing.

22 And I've gone in circles about this for almost a  
23 year now. The question is whether to rely on the medical  
24 providers, which are affirmed in the presentence report, or to  
25 rely on observations in a correctional setting that may have

1 less to do with therapeutic options. That's my concern, and  
2 so I don't rely on them. I don't think the Court should as  
3 well.

4 Well, it seems clear that -- well, it seems clear,  
5 it's beyond doubt that he's got some issues with the L-4/5,  
6 and there's no question in my mind that that causes him pain,  
7 and that that is going to be something that will have to be  
8 addressed and managed.

9 MR. ALIGADA: I have a binder clip for that.

10 THE COURT: I'm going to give these back to you  
11 unless you feel some need to make them part of the record.

12 MR. ALIGADA: No, Your Honor.

13 THE COURT: It's also beyond question that the  
14 impact that the back problem has on his ability to be mobile  
15 seems to vary from time to time. To look at him today, he can  
16 hardly stand, and yet he is able to do these pushups with his  
17 legs elevated on the sink. He was able to run. He was able  
18 to jump.

19 I see from the pictures, that he's able to stand and  
20 hold children. And there's no brace there. He's able to  
21 squat, lean over, bending his back, and then -- so, I mean  
22 he's not immobilized, but it's beyond doubt that he's not in  
23 fact immobilized. He does experience pain, and that is backed  
24 up by the medical records. So that's how I see the state of  
25 the record with respect to the back injury.

1           So setting aside the back injury, is there any other  
2 area of comment that you want to make before I hear from your  
3 client, if he wants to talk?

4           MR. ALIGADA: From a 3553 point of view, Your Honor,  
5 I would just reference Raymond Varner's letter. It does an  
6 excellent job of explaining the difficult upbringing that  
7 Mr. Varner had. And I think as Ray puts it, that as children,  
8 they learned rules of the game which undoubtedly are not the  
9 way that citizens should conduct their lives. But at age 8  
10 and 9, that's how things were taught to them.

11           So Mr. Varner is constantly struggling to recover  
12 from that life and to end where I started. The photograph of  
13 him with the scissors is that full circle of really trying to  
14 turn it around. And when Mr. Varner is finished with his  
15 sentence, that is something that he intends to return to.  
16 Thank you.

17           THE COURT: Thank you. Mr. Varner, this is your  
18 chance to speak in your own behalf, if you wish to do so,  
19 before I impose sentence.

20           THE DEFENDANT: Thank you. I really ain't -- I got  
21 a lot to say, but I really don't want to be rude, but.

22           THE COURT: Be what?

23           THE DEFENDANT: I have a lot I would like to say but  
24 I don't for you to feel like I'm being rude with you or with  
25 the Courts with the situation that took place with me with all

1 of this.

2 I don't have no reason to lie about anything. I'm a  
3 man. You all seen my -- you looked at my record. I've got  
4 all of these felony convictions and points because I took a  
5 plea bargain for me because I own up to my stuff. That's what  
6 men do. Where I'm from, you accept what you do. If you do  
7 it, you accept the consequences. This ain't something that I  
8 done.

9 So I lost a lot that I worked really hard for coming  
10 from where I came from, and now I'm sitting to where I have  
11 really -- I don't have nothing, not even be able to really  
12 move around or nothing, you know. And this is not fair to me  
13 or my family, my kids. You know.

14 Like he said, my daughter plays ball for the Lynx.  
15 I think I went to one game last year because I wasn't -- they  
16 say you can't fly. You just got out of prison. You can't  
17 fly. They want you clear for a year or some stuff. Then I  
18 guess the chance a year come around, I can move around and  
19 spend more time with my kids. Now, I'm in here. I understand  
20 that the police --

21 MR. ALIGADA: May I have a moment, Your Honor?

22 THE DEFENDANT: -- the marshals.

23 MR. ALIGADA: May I have a moment to speak with  
24 Mr. Varner?

25 THE COURT: Sure.

1 (Off the record discussion between the defendant and  
2 the defense counsel.)

3 MR. ALIGADA: Thank you.

4 THE DEFENDANT: That's it. That's all I'm going to  
5 say. I appreciate you taking time and cooperation and  
6 patience with me during this situation that we've been went  
7 through since I've been in your courtroom.

8 THE COURT: You don't have to say that. And if  
9 there's more that you want to say, I'm not going anywhere. I  
10 guess you're not going anywhere, not to be --

11 THE DEFENDANT: No, that's, that's, that's good  
12 enough.

13 THE COURT: Okay. It seems that you've been  
14 sometimes you've pled guilty, and sometimes you've gone to  
15 trial on some of these priors. And the points add up to what  
16 they add up to. But you were done, right, Mr. Varner? You've  
17 said everything you've wanted to say?

18 THE DEFENDANT: Yeah, I had to say something else  
19 but I forgot though.

20 MR. ALIGADA: It's up to you.

21 THE DEFENDANT: I can't remember, man. Just one  
22 question because it's been puzzling me because I've been doing  
23 some research on myself with my case that I'm in here for. I  
24 asked my lawyer, but I was asking can I know if get it in  
25 writing or something, but he really doesn't really say.

1 But I was wondering how far do you go back on the  
2 statutes for like career criminals, because I read in this,  
3 "Busted By The Fed" books that they only go back 15 years.  
4 But from my understanding from my lawyer, they can go back as  
5 far as they want to.

6 THE COURT: There's an actual book called, "Busted  
7 By The Fed?"

8 THE DEFENDANT: Yeah.

9 THE COURT: Is it good? Should I read it?

10 THE DEFENDANT: I think it kind of lightened me up  
11 on a little stuff with what's going on with me right now. But  
12 one part it says, "see career criminal for the sentencing  
13 thing." And back there, it says they can't go past 15 years.  
14 So I asked my lawyer, and he really is saying the same thing,  
15 but so now I'm asking you. And that's basically really the  
16 most important question that I would like to ask and say  
17 today.

18 THE COURT: Okay. Mr. Aligada, do you know what  
19 he's talking about?

20 MR. ALIGADA: I do, Your Honor. Armed career  
21 criminal is predicate offenses. And Mr. Varner and I have  
22 discussed how far back predicate offenses can go to count.  
23 And the distinction between career offender designation --

24 THE COURT: For the guidelines.

25 MR. ALIGADA: -- for the guideline purposes, and for



1 the career guideline enhancement versus the statutory  
2 component of ACCA and the age of convictions. It's my  
3 understanding from researching the law and prior cases, that  
4 ACCA predicates have no time bar going backward. 924E does  
5 not provide a limitation on how far back you can go.

6 Because one of Mr. Varner's early convictions that  
7 is a predicate is old enough that it would age out for  
8 purposes of something like criminal history points or career,  
9 but not for ACCA. And so I've explained that to him, and he  
10 wants to check a second source with the Court. I respect  
11 that.

12 THE COURT: When did he get out after that? After  
13 that oldest?

14 MR. ALIGADA: I believe it was a 1989 conviction.  
15 Paragraph 27 of the presentence report includes a notation  
16 that an aggravated robbery offense from Ramsey County was a  
17 predicate under 4B1.4. And, frankly, under 924E as well. He  
18 was discharged from custody on 1/9 of 1994.

19 THE COURT: So '94, 2004, 2009, so that would be  
20 just outside the 15 years.

21 MR. ALIGADA: Correct.

22 THE COURT: So that's his concern.

23 MR. ALIGADA: It's a legitimate question.

24 THE COURT: Yes, that is a legitimate question.  
25 I've got get ahold of this book. There's probably all kinds

1 of stuff in there that would explain why people make some of  
2 the arguments that they do. Who wrote that book? Is that a  
3 reliable person who wrote that book?

4 THE DEFENDANT: I think his name is something  
5 Williams or something. Cooper Williams?

6 THE COURT: The name doesn't mean anything to me,  
7 but is he a lawyer or is he an inmate or what the heck is he?  
8 I suppose he could be both.

9 THE DEFENDANT: He was a paralegal or something, and  
10 got that when he was in the feds, and then he wrote the book.

11 THE COURT: Okay. Go ahead.

12 MR. ALIGADA: Just to make a factual clarification  
13 that Mr. Varner just brought to my attention. The Court  
14 referenced earlier standing, sitting, squatting. This  
15 photograph was taken after the point when he was robbed. But  
16 the rest of the photographs, the one where he is squatting.  
17 It's hard to tell in this photograph and a couple of others  
18 where he is standing was prior to the robbery. Just for  
19 factual clarification.

20 THE COURT: Okay. I don't know what they give you  
21 for books in there, and I am not qualified to give you legal  
22 advice.

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: I am paid to make legal decisions, but I  
25 am absolutely not allowed to give people legal advice. So

1 your lawyer is here.

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: And I'm going to just point out some  
4 parts of the statute and parts of the guidelines in the  
5 application that might be helpful to you in your discussions  
6 with him. But we're clear on that I can't give you any legal  
7 advice, right?

8 THE DEFENDANT: Yes, ma'am. Yes, ma'am.

9 THE COURT: So the statute that makes you an armed  
10 career criminal, this is this 924E that your lawyer was  
11 talking about.

12 THE DEFENDANT: I don't think that was in the book  
13 as to what it was.

14 THE COURT: Yeah, you know what? That book sounds  
15 like not really an authoritative source to me. People can  
16 write whatever they want so, I don't know. But anyway,  
17 whatever that book is, it does not have the force of law.

18 THE DEFENDANT: Yes, ma'am.

19 THE COURT: This is where the -- this book here,  
20 this light green one is the Criminal Code. It's the 2011  
21 printing of the Criminal Code. But it's everywhere.

22 So this is 924E. And it talks about the prior  
23 offenses of violent felonies or serious drug offenses. And  
24 the only reference to 15 years there is the mandatory minimum  
25 sentence of 15 years. So you've got no -- there is no age

1 limit that is spelled out in this section.

2 THE DEFENDANT: Yes, ma'am.

3 THE COURT: So that's probably what your lawyer was  
4 talking about for that. So that's right there on page 725.

5 Then there are the guidelines. And this career  
6 offender guideline is section 4B1.2. And the most current  
7 version of the guidelines is the bright green book, but this  
8 part hasn't changed.

9 And 4B1.2 talks about what a crime of violence  
10 means, and that includes crimes that have the attempted use,  
11 threatened use of physical force against another or burglary  
12 or controlled substances, all of which are defined.

13 Now, there's nothing in there about a time limit.  
14 But under normal circumstances, there is a time limit to how  
15 old a criminal conviction can be when you're going to  
16 calculate somebody's criminal history.

17 THE DEFENDANT: Yes, ma'am.

18 THE COURT: But -- I just saw this application note  
19 that said that that doesn't count for this. Now, I can't find  
20 it again.

21 MS. SCHOMMER: I believe it's the application note  
22 to 4B1.4.

23 THE COURT: There we are. I just had it.

24 Mr. Aligada, would you show him, we've got 4B1.4,  
25 and go to the application note 1, so the top of page 396

1 there. And I'm going to be in the first paragraph there, in  
2 the middle of the first paragraph. Do you see where it says,  
3 "It is to be noted that --"

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: "It is to be noted that the definitions  
6 of violent felony and serious drug offense in 924E2 are not  
7 identical to the definitions of crime of violence and  
8 controlled substance offense used in the career offender."

9 THE DEFENDANT: Okay.

10 THE COURT: But then look at next. It says, "nor  
11 are the time periods for the counting of prior sentences under  
12 4A1.2, which is definitions and instructions for computing  
13 criminal history applicable to the determination of whether a  
14 defendant is subject to an enhanced sentence under 924E."

15 THE DEFENDANT: Okay.

16 THE COURT: So there is a time limit for criminal  
17 history, but then there are special provisions for the career  
18 offender and armed career criminal. So you do your own  
19 research, and you talk to your own lawyer. But that's my  
20 basis for not excluding that '94 conviction, so I say that by  
21 way of explanation for my decision and not by way of legal  
22 advice to you.

23 THE DEFENDANT: Yes, ma'am. Thank you.

24 THE COURT: Well, now I have to determine what to do  
25 in terms of a sentence. Now, I know that you had a very

1 difficult and cruel childhood. I know that following that,  
2 you committed an awful lot of crimes. And if the way that you  
3 were raised gets you back out on the street faster, the  
4 criminal history here shows that that's not safe for the  
5 community. Because for whatever reason, and it seems likely  
6 that it is related to the fact that you had such a cruel  
7 upbringing, what that has done to you has made you commit all  
8 of these crimes.

9 Are you going to turn over a new leaf? I think  
10 that's a good possibility, and having a skill and being so  
11 persistent in it. And I liked reading that you actually  
12 sometimes would pay the bus fare, the transportation fare for  
13 people to come and let you work on their hair.

14 So that's a, you know, it's a possibility. But what  
15 you did with your upbringing so far is not something that  
16 weighs in your favor. It weighs in favor of making sure that  
17 we protect the public from, you know, what happened. Yes,  
18 sir?

19 THE DEFENDANT: I learned from all this, right? I  
20 know I didn't get to be the person that I am overnight. And  
21 so it took me a long time to become the person that I am right  
22 now. So to keep moving forward, that's where I'm going to  
23 keep my mind set at. That's why I do here, because if you  
24 feel good. If you look good, you feel good. You want to do  
25 great.

1           THE COURT:  Yep, I saw that.  That's the part of the  
2   joy that you get out of the hair cutting.

3           THE DEFENDANT:  So that's something that I never  
4   received when I was growing up.  So now since I found  
5   something that makes me happy, that keeps me happy, I share it  
6   with other people.  That was the whole thing about my life  
7   turn around.  Whatever happened before then, I came somewhere  
8   else, and now I found something different.

9           THE COURT:  Yep, yep, and that happens to people.  
10   And for a lot of people, it sticks.  You know, some people  
11   have a conversion, and they turn their life around, and it  
12   sticks for a while, and then they back slide.  But sometimes  
13   it really does, especially if somebody is well into adulthood,  
14   as you are, it really can stick.  You just don't know for sure  
15   whether it's going to or not, but it can.

16           And your cousin wrote this very nice letter for you,  
17   and talked about how you don't want to perpetuate the  
18   fatherless situation that you had.  But I think you've got a  
19   bunch of kids, don't you?

20           THE DEFENDANT:  Yep.

21           THE COURT:  You've got six children.  Determining  
22   what the overall range, you know, kind of what the range is of  
23   appropriate sentences isn't something that judges do  
24   completely one-on-one each time, and pick a number out of thin  
25   air.

1           We've got a Guideline Commission that looks at  
2     people's history, what's likely to happen, what are good  
3     indications of what might happen in the future. They do  
4     whatever they all they do, and they come out with these  
5     sentencing guidelines.

6           And the sentencing guidelines for you are guidelines  
7     that are -- there's nothing about them that's not appropriate  
8     to your situation. It takes account of your criminal history.  
9     It takes account of the fact that you had this gun. It takes  
10    account of the, you know, you're kind of on paper situation.

11          So is there anything that should give you a higher  
12    sentence? The government has withdrawn its request that you  
13    get a sentence higher than 293 months. I don't think I'd give  
14    you a sentence of higher than 293 months any way even if they  
15    asked for it, because that would be, I just think that would  
16    be more than you really need. Because you are 41. I'm  
17    thinking that you're 41. Maybe you're not 41 anymore.

18          MR. ALIGADA: 42, Your Honor.

19          THE COURT: 42 now. Anyway, I just think that's too  
20    much. The only listed factor that gives me pause about giving  
21    you a sentence below the guidelines, and that would require my  
22    deciding that the bottom of the guidelines would be more than  
23    was necessary for you, is this physical issue that we spent so  
24    much time talking about.

25          And I can't tell really what you are physically able



1 to do, and what you're physically not able to do. We do have  
2 people in the institutions who literally can't walk, and they  
3 can't do physical exercise, whether they're in pain or not.

4 Now, the BOP, the Bureau of Prisons, is going to be  
5 in a better position to help you with your back problem than  
6 the county jail was. So the fact that the county jail dealt  
7 with your problem in the way that they did, not that that was  
8 bad or inadequate, but not necessarily something that you  
9 would want to keep doing for the next many years. So the  
10 Bureau of Prisons will be in a better position to do that.

11 And your medical situation isn't so far outside the  
12 norm that that would be a reason to give you a sentence that  
13 is not within the range that otherwise would be appropriate  
14 for you.

15 And so something in the neighborhood of about, you  
16 know, probably 250 months is what I would be thinking. But I  
17 want to get you out in the shortest period of time consistent  
18 with the appropriate punishment and all of the factors that go  
19 into those not only the guidelines but also looking at the  
20 seriousness of the offense and so on.

21 So it seems to me that going to the very bottom of  
22 the guideline range is something that I can do, and that  
23 that's not going to be more time than you earned yourself by  
24 the commission of this crime.

25 I recognize that's a long time. And there's an

1 argument to be made that all sentences, in a way, in this  
2 country are too long. But that's not a philosophical debate  
3 to be had for today.

4 So I'm going to sentence you to the bottom of the  
5 guideline range which is to say 235 months. And then you are  
6 going to be on supervised release for a period of five years  
7 after you get out. And the conditions will all be explained  
8 and read to you separately.

9 But they are that you have to report to the U.S.  
10 Probation and Pretrial Services Office in the district where  
11 you are released within 72 hours of release from custody.

12 You may not commit any crimes: Federal, state, or  
13 local.

14 You may not illegally possess a controlled  
15 substance. You have to refrain from my unlawful use of a  
16 controlled substance and submit to one drug test within 15  
17 days of release from imprisonment, and at least two periodic  
18 drug tests thereafter as determined by the Court.

19 And let me just pause on that, and what I'm going to  
20 say here for a moment is not part of the conditions of  
21 supervised release. But I know when you were caught, and I  
22 didn't give you those four points, but you had a prescription  
23 for OxyContin or some kind of a strong medication.

24 THE DEFENDANT: Percocet.

25 THE COURT: Was it Percocet? Because what you had

1 on you was --

2 THE DEFENDANT: It's Percocet. I don't know what --  
3 it's Percocet. That's the only thing that the hospital  
4 prescribed for me and gave to me.

5 THE COURT: Okay. But there were two different  
6 kinds of drugs in that container that you had on you when the  
7 police caught you back in September of 2010. So what I'm  
8 saying is that I've got this condition here about not  
9 illegally possessing a controlled substance, because you'll  
10 probably have, maybe you'll have surgery, and the pain will go  
11 away.

12 But if you have a prescription, you can't be  
13 carrying something that's similar to that prescription or you  
14 could be in violation of this condition of supervised release.  
15 So that's just kind of an aside on that.

16 Then continuing on with the conditions: You may not  
17 possess a firearm. No surprise there. No firearm,  
18 ammunition, destructive device, or other dangerous weapon.  
19 And you have to cooperate in the collection of DNA as directed  
20 by the probation officer. I know that kind of doesn't make  
21 sense, but that's a requirement for basically all people who  
22 are convicted of a federal felony.

23 You have to abide by the standard conditions of  
24 supervised release that have been adopted by the Court  
25 including the following special conditions:

1           You have to participate in a program for substance  
2       abuse as approved by the probation officer. And that program  
3       may include testing and inpatient or outpatient treatment,  
4       counseling, or a support group. I'm thinking should I make  
5       you pay for that pursuant to the Court's program? And I'm  
6       going to say no. I'm not going to make you pay on the  
7       co-payment plan.

8           If you're not employed at a regular lawful  
9       occupation as deemed appropriate by the probation officer, you  
10      may be required to perform up to 20 hours of community service  
11      per week until you are employed and to participate in  
12      training, counseling, daily job searches or other employment  
13      related activities, as directed by the probation officer.

14          And then the final condition is that you are to  
15      submit your person, residence, office, vehicle or an area  
16      under your control to a search conducted by a U.S. probation  
17      officer or a supervised designee at a reasonable time and in a  
18      reasonable manner, based on reasonable suspicion of contraband  
19      or evidence of a supervision violation. And you are to warn  
20      other residents or third parties that the premises and areas  
21      under your control may be subject to searches pursuant to this  
22      condition.

23          So those are the conditions of supervision. As you  
24      know, I do have to impose a special assessment, and that is a  
25      \$100 special assessment, because that is the single count of

1 conviction.

2 I'll make some recommendations to the Bureau of  
3 Prisons, but before I do that, I want to make sure that I  
4 don't forget to let you know that any appeal would have to be  
5 noted within 14 days of today's date. If you cannot afford a  
6 lawyer on appeal, then you have one appointed to represent you  
7 at no cost.

8 I will recommend to the Bureau of Prisons that you  
9 be placed in a medical facility, at least initially for  
10 evaluation, and that you at all times during your  
11 incarceration be placed in a facility that is able to  
12 accommodate your back problem. I will specifically recommend  
13 the Rochester Institution in Minnesota.

14 THE DEFENDANT: Thank you.

15 THE COURT: And the reason for that is that it's  
16 going to be close to your family, and you'll be able to  
17 maintain those connections, and that will help you for when  
18 you get out. It will also help them.

19 And it is also an institution that we know for a  
20 fact is going to be able to take care of your problems. There  
21 are at least one other federal medical institution that would  
22 be very, very supreme in being able to take care of your  
23 medical problem, but they're not to put you someplace where  
24 your medical needs won't be met.

25 Now, Ms. Schommer, there's a forfeiture provision,

1 right?

2 MS. SCHOMMER: There is, Your Honor. And I believe  
3 I have to go back and look through the file, but I believe  
4 there is a preliminary order entered by the Court for that  
5 issue.

6 THE COURT: Okay. And that's made final.

7 Mr. Aligada, is there anything else?

8 MR. ALIGADA: If I could just consult with  
9 Mr. Varner for a second.

10 THE COURT: Sure.

11 (Off the record discussion between defendant and  
12 defense counsel.)

13 MS. SCHOMMER: Your Honor, that preliminary  
14 forfeiture was filed on March 21, 2007.

15 MR. ALIGADA: Nothing further, Your Honor.

16 THE COURT: All right. This is unrelated to  
17 Mr. Varner, but this massacre in Norway is on everybody's  
18 mind, and the maximum term of imprisonment in Norway, did you  
19 see is what, 20 years? 21 years?

20 MR. ALIGADA: I didn't realize it was that low.

21 THE COURT: So I think they have to get out in 17.  
22 Now, that I base on another non-authoritative legal source  
23 which is the radio. But we're not living in Norway.

24 Well, that's everything. And, Mr. Varner, I know  
25 that you're not a bad person. But, you know, there's the

1 crime, and there's the run up to the crime, and there's the  
2 punishment. So I hope, and I have some confidence that you  
3 are going to take it from here and you're going to be okay.  
4 But that's about it. That's about all we can do here. So we  
5 are in recess. Thank you.

6 (End of proceedings.)

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15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above matter.

17  
18 Maria Weinbeck, RMR, FCRR

19 Official Court Reporter  
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